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No. 09-900

Supreme Court, U.S.
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In the Supreme Court of the United States

LINDA ANITA CARTY,

Petitioner,

v.

RICK THALER, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Capital Case

PETITION FOR REHEARING

Michael S. Goldberg*
Maryanne Lyons
Marisa C. Hurd
Joshua Nix
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, Texas 77002
(713) 229-1234
michael.goldberg@bakerbotts.com

*COUNSEL OF RECORD

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44 2, Petitioner Linda Carty respectfully petitions for rehearing of this Court's May 3, 2010 order denying her petition for writ of certiorari

In this capital case, Linda Carty, a British and St Kitts national, seeks a writ of habeas corpus based upon the violation of her Sixth Amendment right to effective assistance of counsel. In stark contrast to the vast majority of ineffectiveness cases presented to this Court, the Fifth Circuit unequivocally held that trial counsel's performance was deficient in both the

culpability and punishment phases of trial. Consequently, the only remaining question in what the Fifth Circuit itself deemed a "close case" is whether those clear deficiencies prejudiced Carty under *Strickland v Washington*, 466 U.S 668 (1984) The answer is an emphatic yes, and an intervening opinion of this Court reinforces that the order denying certiorari should be vacated and that this case should be set for briefing on the merits, or vacated and remanded for further proceedings in the Fifth Circuit not inconsistent with that intervening decision.

GROUNDS FOR REHEARING

Following this Court's denial of Carty's petition for writ of certiorari on May 3, 2010, this Court granted certiorari in *Jefferson v Upton*, a case implicating many of the same issues raised in Carty's petition No. 09-8852, 560 U.S —, 2010 WL 2025209 (May 24, 2010) (per curiam).[1] In *Jefferson*, this Court held that the Eleventh Circuit may have improperly deferred to state court factual findings that resulted from a flawed fact-finding procedure. *Id* at *6 Accordingly, this Court vacated the Eleventh Circuit's opinion and remanded the case for a determination of "whether the state court's factual findings warrant a presumption of correctness." *Id* at *7

The parallels between *Jefferson* and this case are striking and demonstrate that certiorari should be

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[1] This Court granted certiorari, vacated, and remanded the case for further consideration in light of the Court's opinion *Jefferson*, 2010 WL 2025209, at *8

granted [2] As in *Jefferson*, Carty argued in both the district court and the Fifth Circuit that the state court's fact-finding procedure was woefully inadequate, rendering many of its so-called "findings" unreliable at best. Notwithstanding, the federal courts denied Carty's numerous requests for an evidentiary hearing at every turn. Ensconcing the state court's findings safely beyond assail, the district court and Fifth Circuit then compounded such error by relying upon these dubious findings in concluding that Carty did not suffer *Strickland* prejudice by her trial counsel's numerous deficiencies Even worse, the Fifth Circuit deferred to these findings despite purporting to apply de novo review to various aspects of Carty's ineffectiveness claim [3] Those courts were wrong because the state court's findings were based on deficient process, were not entitled to deference, and should not be allowed to skew the prejudice analysis

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[2] Although *Jefferson* was a pre-AEDPA case, that does not alter the analysis here Because the state court did not adjudicate the bulk of Carty's ineffectiveness claims, those claims are not subject to AEDPA deference and therefore are governed by pre-AEDPA jurisprudence, as in *Jefferson* To that end, the Fifth Circuit professed to apply de novo review to Carty's unadjudicated claims (Pet 16a (citing *Riley v Cockrell*, 339 F 3d 308, 318 (5th Cir 2003), *Jones v Jones*, 163 F 3d 285, 299-300 (5th Cir 1998)))

[3] As argued in Carty's petition for certiorari, the Fifth Circuit's unusual practice of carving a unitary ineffectiveness claim into distinct "sub-claims," and then applying differing standards of review to the fragments of each claim without any state or federal court's ever reviewing the entirety of the claim de novo is alone reason to grant certiorari

ARGUMENT

I. As in *Jefferson*, the state court's fact-finding procedure was woefully inadequate to afford Carty a full and fair hearing on her constitutional claims for relief.

A brief review of the habeas proceedings in state court demonstrates the inadequacy of the state court's "fact-finding" procedures. In May 2004, the British Government hired Baker Botts to participate in Carty's case. (SHR 477-79.) Following the firm's retention, Baker Botts attorneys Michael Goldberg and Maryanne Lyons met with Judge Carol Davies and attorneys from the Harris County District Attorney's office to discuss the timetable for Carty's new counsel to perform an investigation of her claims and submit any additional filings (USCA5 2072.) Pursuant to the parties' agreement, Carty filed an additional further response and proposed findings of fact and conclusions of law on November 1, 2004. (SHR 485, 698.) That same day, the State filed its proposed findings and conclusions

At a November 30, 2004 conference before Judge Davies, Carty presented oral argument on the claims briefed in her additional further response.[4] Following argument, Judge Davies assured the parties that she would review each party's findings and conclusions "with more care" before issuing her ruling (Nov. 30, 2004 Tr. 16.) But Judge Davies did nothing of the sort

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[4] Although the State was given the opportunity to present oral argument at this conference, it declined to do so

Contrary to the state court's assurance, just two days later, that court adopted verbatim—down to the last comma—the State's proposed findings of fact and conclusions of law In so doing, not only was Carty denied a full and fair hearing on her constitutional claims, but also the state court *did not even acknowledge* an abundance of her claims for relief, including those on which the district court later granted a certificate of appealability and which formed the basis of the Fifth Circuit's opinion Moreover, in addition to ignoring the vast majority of Carty's submitted evidence, the state court made "findings" that, as in *Jefferson*, relied upon credibility determinations of witnesses who never offered live testimony and/or that were otherwise wholly unsupported by the record For instance, the trial court·

- Made numerous findings based on the "*credible* affidavit[5] of trial counsel Jerry Guernot" regarding Carty's alleged uncooperative behavior, such as supposed failures to provide names of potential witnesses and to inform counsel of a prior sexual assault, and regarding counsel's general trial "strategy" (*see, e g* , SHR 772-73, 776, 778-79, FOF ¶¶ 6-8, 13, 27, 34, 36-37, 40 (emphasis added)), and

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[5] Courts have viewed with skepticism a state court's fact-finding procedure where credibility determinations were made without the benefit of an evidentiary hearing *Smith v Zant*, 887 F 2d 1407, 1433 n 15 (11th Cir 1989) ("We previously have expressed doubts as to whether a credibility determination can be fairly made on a paper record ")

- Found that the mitigation evidence elicited at trial was "essentially the same mitigating evidence that the applicant now claims on habeas should have been presented" (SHR 779, FOF ¶ 39)

Following the trial court's swift rubber-stamping of the State's findings and conclusions, the Texas Criminal Court of Appeals then adopted wholesale the trial court's findings and conclusions Multiple courts, including this one, have viewed with skepticism the verbatim adoption of one party's proposed findings of fact and conclusions of law. *See Jefferson*, 2010 WL 2025209, at *3; *Anderson v City of Bessemer City*, 470 U.S. 564, 572 (1985) (stating that "[w]e, too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties"); *United States v Marine Bancorporation Inc*, 418 U S. 602, 615 n.13 (1974)); *McLennan v Am Eurocopter Corp*, 245 F.3d 403, 409 (5th Cir 2001) ("[A]dopt[tion of] one party's proposed findings and conclusions without change may cause us to approach such findings with greater caution, and as a consequence to apply the standard of review more rigorously.").

Aside from this concern, as in *Jefferson*, there is even more reason to be skeptical of the state court's findings in this case where it is clear that the court did not even consider the evidence Carty submitted with her additional further response and subsequently addressed during oral argument This is evident from the fact that the state court adopted verbatim the State's findings, which completely ignored all of the claims for relief included in Carty's response and the bulk of her proposed findings and conclusions These claims were left unaddressed and unadjudicated

As in *Jefferson*, Carty repeatedly challenged the state court's flawed fact-finding procedure and requested an evidentiary hearing on her claims in both state and federal court (*See* SHR 84, 160, 285, 291, 306, 313, 326, 341, 382, 405, 589; USCA5 2684.) For instance, Carty specifically challenged the state court's failure to address the impact that numerous other non-family mitigation witnesses would have had on the jury's determination during the punishment phase of her trial. (USCA5 2704-05) Carty's requests for an evidentiary hearing, however, were denied notwithstanding the presence of factual disputes, which if resolved in Carty's favor would have entitled her to relief. *Perillo v Johnson*, 79 F 3d 441, 444 (5th Cir 1996) ("When there is a factual dispute, [that,] if resolved in the petitioner's favor, would entitle [her] to relief and the state has not afforded the petitioner a full and fair evidentiary hearing, a federal habeas corpus petitioner is entitled to discovery and an evidentiary hearing.") (citation omitted)

Because the lower courts never tested these disputed and suspect "findings," not only did the Fifth Circuit improperly defer to them for purposes of AEDPA, but it also allowed them to distort the prejudice analysis

II. The Fifth Circuit improperly deferred to the state court's flawed factual findings in conducting its *Strickland* prejudice inquiry.

The Fifth Circuit found that the state court did not adjudicate a number of Carty's claims, and therefore, that those claims were subject to de novo review, not AEDPA deference (Pet 16a, 39a, 40a-41a (explaining that Carty's ineffectiveness claims as to the

failure to inform José Corona of the spousal privilege and the failure to present additional mitigation evidence would be reviewed de novo and were not subject to AEDPA deference).) Although purporting to apply that standard, the court then improperly deferred to the state court's flawed factual findings as a basis for its legal conclusion that Carty did not suffer *Strickland* prejudice This fundamental error entitles Carty, at the very least, to a remand whereby the lower courts determine whether the state court's findings warrant a presumption of correctness

The most egregious example of this improper deference is demonstrated by Carty's claim that trial counsel was ineffective for failing to present—or even contact—numerous mitigation witnesses from Carty's home island of St Kitts (*Id* at 41a) This claim was presented to the state habeas court but left unadjudicated following the state court's verbatim adoption of the State's proposed findings. The Fifth Circuit recognized that de novo review was appropriate for this (improperly) fractured sub-part of Carty's ineffectiveness claim. (*Id*) Yet, in conducting its prejudice analysis, the Fifth Circuit—as had the district court before it—improperly deferred to the state habeas court's findings on this issue.

The district court simply dismissed the parade of mitigation witnesses who were never contacted by Carty's trial counsel, all of whom attested they would have traveled to Houston, Texas, to testify on Carty's behalf. (*Id* at 42a n 16.) Moreover, although acknowledging that this evidence was unadjudicated in state court (USCA5 2842-43), the district court nonetheless improperly applied AEDPA deference to numerous state court findings in denying this portion of

Carty's ineffectiveness claim (*Id* at 2843-44 (noting that "AEDPA's respect for state-court decision [sic] only augments *Strickland*'s standards" and that "trial counsel presented at punishment essentially the same mitigating evidence that [Petitioner] now claims on habeas should have been presented" (quoting state habeas court FOF ¶ 39))) It did so notwithstanding the repeated challenges Carty had lodged to the state court's suspect fact-finding process. (*See* USCA5 35-40 (arguing that the state court's findings were not entitled to a presumption of correctness because that court either (1) adopted the State's findings wholesale, or (2) failed to address numerous claims which "call[s] into question the reasonableness of the trial court's entire findings and conclusions"); USCA5 2198-2203 (again arguing that the state court's findings were unreliable and not entitled to a presumption of correctness).)

Following suit, the Fifth Circuit similarly deferred to erroneous state court findings in determining that Carty did not suffer sentencing prejudice by her counsel's failures[6] (Pet 40a-43a.) Notably, the Fifth Circuit deferred to the state court's findings that Carty's alleged uncooperativeness contributed to her counsel's numerous deficiencies. (*Id* at 42a, *see also* SHR 772, 779, FOF ¶¶ 6-7, 37) But the only basis for these allegations was the "credible affidavit" of trial counsel himself, who has never offered

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[6] As argued in Carty's petition, because the Fifth Circuit performed a separate inquiry with regard to each type of mitigation evidence, never assessing the totality of the evidence for purposes of prejudice, it violated *Strickland*, as recently applied in *Porter v McCollum*, 130 S Ct 447 (2009) (per curiam)

live testimony and has, in fact, offered conflicting accounts of the disputed facts underlying Carty's claims for relief.[7] (*See* USCA5 2706-07)

For instance, during federal habeas proceedings, trial counsel told a reporter that there was no reason to conduct a St. Kitts investigation because Carty "ain't from there." (USCA5 2718) Prior to Carty's trial, however, Mr Guernot applied for state court funds to travel overseas, telling the court that "[t]here is the investigation of witnesses, the possibility of an overseas investigation, inasmuch as Ms Carty is not from the United States " (3 R R 12) Although Carty presented this evidence to the Fifth Circuit, that court erroneously concluded—based upon the state habeas court's "findings"—that Carty "did not inform trial counsel that she was a foreign national or provide counsel with her contacts in St. Kitts " (Pet 42a.) This is simply wrong. If Carty truly never informed trial counsel that she was from St Kitts, then how did Guernot know to request court funds for an "overseas investigation?" After the state court granted Guernot's request for increased funds, he conducted *no investigation* into the powerful mitigating evidence that the undersigned counsel elicited from the St Kitts witnesses.

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[7] Jerry Guernot is an infamous, former capital defense lawyer in Texas, who has left in his wake 20 former clients now sitting on death row His woeful performance has made the world's preeminent media sources take notice Adam Liptak, *A Lawyer Best Known for Losing Capital Cases*, N Y TIMES, May 17, 2010, *available at* http //www nytimes com/2010/05/18/us/18bar html?emc =etal (describing Guernot's "failure to conduct even rudimentary investigations")

Moreover, any assertions by Guerinot in his "credible affidavit" about Carty's uncooperative nature were cast in a dubious light by evidence of Carty's pre-trial disclosures to the defense's own investigator and psychologist about being from St Kitts, her strong relationship with the former Prime Minister of St. Kitts, and about being raped and giving up that child for adoption (USCA5 249, 253, 446-47, 515-16.)

And there is no doubt that the St. Kitts witnesses, had they testified, would have provided a unique view into Carty's life as a caring teacher, political and community activist, and devoted friend that was wholly absent from trial counsel's scant mitigation presentation The district court, however, merely parroted the state court's finding that "trial counsel presented at punishment essentially the same mitigating evidence that [Petitioner] now claims on habeas should have been presented" (USCA5 2844 (quoting SHR 779, FOF ¶ 39)) This conclusion, and the state court finding upon which it is based, is clear error

The Fifth Circuit recognized that the sub-part of Carty's ineffectiveness claim regarding the St Kitts witnesses demanded de novo review because it was unadjudicated by the state court. (Pet. 16a, 39a, 40a-41a.) However, the Fifth Circuit, while purporting to perform this de novo review, paid direct homage to the state court's finding—adopted by the district court—that the mitigating evidence at trial was essentially the same evidence that Carty claims should have been presented (*Id* at 42a (stating that Carty's mother, sister, and daughter presented "at least some of the proffered information to the jury" as the St Kitts witnesses).)

Under governing pre-AEDPA jurisprudence, the Fifth Circuit's deference to the state court's findings while conducting its de novo review and analysis of the prejudice prong of Carty's ineffectiveness claim was erroneous where the fact-finding process itself was tainted *Jefferson*, 2010 WL 2025209, at *5-*6 (citing *Townsend v Sain*, 372 U.S. 293, 312 (1963)) But the most disturbing aspect of such error is that it worked to derail what otherwise appeared to be the court's leaning toward a favorable assessment that "these witnesses would have provided a much more nuanced and detailed vision of Carty's life and contributions to the St Kitts community" (Pet 42a) Coupled with a proper assessment of the totality of all favorable mitigation evidence and the proper removal of aggravation evidence from Carty's common-law husband that only reached the jury due to counsel's error, there is little question that Carty suffered *Strickland* sentencing prejudice

At every turn, Carty has challenged the state court's flawed fact-finding procedure yet repeatedly has been denied a full and fair hearing on her constitutional claims The state court's verbatim adoption of the State's findings of fact and conclusions of law, *plus* that court's failure to even acknowledge numerous claims included in Carty's application and discussed during oral argument, raises serious doubts about the adequacy of those findings. The lower courts, however, clearly deferred to these flawed findings, which infected the whole of the courts' prejudice analysis Where this analysis means the difference between habeas relief and death, justice demands that some court ensure that the facts forming the foundation of that analysis are credible *Harris v Nelson*, 394 U.S. 286, 292 (1969)

("There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus.") Amazingly, or perhaps sadly, this basic exercise has never been performed in Carty's case.

CONCLUSION

For all these reasons and those briefed in Carty's petition and reply brief, this Court should vacate its order denying certiorari and set this case for briefing on the merits, or alternatively, grant, vacate, and remand this case for further proceedings not inconsistent with *Jefferson* and/or *Porter*.

Respectfully submitted.

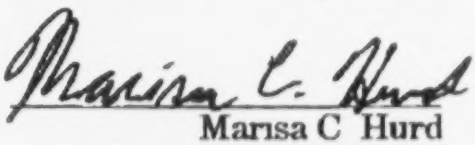
Michael S. Goldberg*
Maryanne Lyons
Marisa C. Hurd
Joshua Nix
BAKER BOTTS L.L.P.
One Shell Plaza
910 Louisiana Street
Houston, Texas 77002
(713) 229-1234
michael.goldberg@bakerbotts.com

*COUNSEL OF RECORD

May 28, 2010

CERTIFICATE OF COUNSEL

As counsel for Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44 2



Marisa C Hurd
Counsel for Petitioner